



CABLE & WIRELESS
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March 23, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., SW
TW-A325
Washington, D.C. 20554

RE: Ex Parte Presentation
Section 1.1206(b)(1) Disclosure
Implementation of the Subscriber Carrier Selection Changes Provision of
the Telecommunications Act of 1996, Policies and Rules Concerning
Unauthorized Changes of Consumers' Long Distance Carriers, Second
Report and Order and Further Notice of Proposed Rulemaking, CC Docket
No. 94-129.

Secretary Salas:

On March 17, 2000, Cable & Wireless submitted the attached comments to the Department of Commerce, which is receiving comments to the Subgroups on Legal Barriers to Electronic Commerce, concerning an issue in the above entitled docket. Specifically, the comments discussed the issue of whether consumers should be allowed to subscribe to telecommunications service through the Internet. C&W USA advocates a rule that permits carriers to employ this medium and to have flexibility in determining whether the subscriber's authorization can be authenticated.

If you have any questions or comments concerning this disclosure or the presentation in general, please do not hesitate to contact me at 703-905-5785.

Sincerely,

Paul W. Kenefick

Attachment

No. of Copies rec'd 0121
List A B C D E

Before the
UNITED STATES DEPARTMENT OF COMMERCE
Washington, DC 20230

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In the Matter of:)
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Laws or Regulations Posing)
Barriers to Electronic Commerce)
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COMMENTS OF CABLE & WIRELESS

Cable & Wireless ("C&W")¹ hereby provides comments on laws or regulations posing barriers to electronic commerce, as requested by the Department of Commerce ("Department") in its Notice for Public Comment ("Notice") published February 1, 2000.² The Notice was issued pursuant to a November 29, 1999, Presidential Memorandum to the Heads of Executive Branch Departments and Agencies entitled "Facilitating the Growth of Electronic Commerce."³ In the Presidential Memorandum, the President noted that certain laws and regulations may have the unintended effect of impeding business-to-business and business-to-consumer online transactions.⁴ The President instructed the United States Government Working Group on Electronic Commerce to establish a subgroup, led by the Department of Commerce, to identify the barriers to electronic commerce and recommend how these laws and regulations should be revised.⁵ A Subgroup of the Working Group on Electronic Commerce, entitled the Subgroup on Legal Barriers to Electronic Commerce ("Subgroup"), was instructed to invite comment concerning laws or regulations administered by any federal agency, including independent agencies.⁶

In these comments, C&W identifies a decision made by the Federal Communications Commission ("Commission" or "FCC") in a December 1998 Further Notice of Proposed Rulemaking ("FNPRM") as a regulatory action that imposes a barrier to the growth of

¹ With customers in 70 countries, Cable & Wireless is a major global telecommunications business with revenue of around \$14 billion in the year ended March 1999 and over 50,000 employees. Its businesses around the world offer a range of services spanning broadband data and Internet services, fixed and mobile voice, as well as interactive entertainment and information. Cable & Wireless' priority for expansion is the fast growing market of data and IP (Internet Protocol) services for business customers. Since November 1998, it has announced major investments in advanced networks in the US and Europe, the restructuring of Cable & Wireless Communications in the UK and has acquired full control of Cable & Wireless IDC in Japan to support this strategy.

² Request for Public Comment, 65 Fed. Reg. 4801 (Feb. 1, 2000).

³ Presidential Memorandum to the Heads of Executive Branch Departments and Agencies, "Facilitating the Growth of Electronic Commerce," (November 29, 1999).

⁴ *Id.*

⁵ *Id.*

⁶ 65 Fed. Reg. at 4802.

electronic commerce and provides a recommendation on how this issue can be resolved.⁷ Specifically, the FCC's current prohibition on a customer's use of the Internet to authorize changes in presubscribed telecommunications services is clearly a barrier to the growth of electronic commerce. In these comments, C&W suggests the Subgroup recommend the FCC address this issue separate from other issues in the same docket and permit consumers to use the Internet when making these changes. These comments to the Subgroup will be simultaneously submitted to the FCC's docket addressing this issue.⁸

Background

In response to a wide variety of interest from carriers and other interested parties, the FCC addressed whether consumers may switch their presubscribed telecommunications carrier through the Internet in its 1998 FNPRM. Many interested telecommunications carriers approached the FCC prior to the FNPRM requesting guidance on whether a contract to change presubscribed telecommunications carriers, referred to as a Letter of Agency ("LOA") under the Commission's rules,⁹ would be recognized as a valid transaction by the Commission if it were authorized through the Internet. The Commission's current rules concerning LOAs¹⁰ were considered in 1994 and finalized in 1995, but they did not address LOAs authorized through the Internet ("Internet LOAs").¹¹

The FCC's Proposed Rule

In a broader proceeding to address issues concerning the unauthorized conversion of an individual's presubscribed telecommunications carrier, commonly referred to as "slamming," the Commission proposed to permit Internet LOAs.¹² The Commission did not oppose the policy of Internet LOAs, rather it prohibited their use until their rules could be finalized dictating the specific terms and conditions by which they could be used. The FNPRM expressed a concern that an electronic signature fails to properly identify the "signer" as an individual who is actually authorized to make

⁷ Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-334, released December 23, 1998 ("Second R&O and Further Notice"). A summary of the Second R&O and Further Notice was published in the Federal Register on February 16, 1999. See 64 Fed. Reg. 7746, as modified 64 Fed. Reg. 9219 (February 16, 1999).

http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fcc98334.txt

⁸ Id.

⁹ 47 CFR §§64.1150, 64.1160 (1999).

¹⁰ An LOA is one of three means to switching telecommunications carriers other than dealing directly with the local exchange carrier. The others include third party verified telemarketing and through a direct dial mechanism. See 47 CFR 64.1150 (1999).

¹¹ Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995).

¹² Second R&O and Further Notice ¶171.

telecommunications decisions,¹³ as well as a concern that a consumer who is “surfing” the Internet could inadvertently authorize for a switch in long distance service.¹⁴

Comments and Reply Comments

In the Comments and Reply Comments to this FNPRM, which were filed in March and May 1999, respectively, an overwhelming majority of commenters supported the Commission recognizing the validity of LOAs formed and authorized through the Internet. Many commenters argued that the Commission’s present rules, which were created with an understanding that LOAs would be paper transactions but did not expressly reject Internet LOAs, could be interpreted as recognizing these transactions.¹⁵ Contracts for other services that have been formed and authorized via telegraph, telephone, facsimile, and the Internet, have been recognized by courts throughout the United States as having the same validity under the law as paper transactions. These and other commenting parties also suggested that if the Commission concluded it was necessary to enact a rule change in order to validate Internet LOAs, then this rule should be narrowly tailored, technologically neutral, using widely accepted means for authenticating and enforcing electronic transactions, without placing undue burdens on carriers and consumers.¹⁶

Commission Inaction Since December 1998

In this case, the barrier to electronic commerce is not a federal agency’s enforcement of an arcane regulation, rather it is an agency’s inaction on a matter that discriminates against electronic commerce. By tentatively concluding that Internet LOAs are currently invalid, thus subjecting a carrier using Internet LOAs to the Commission’s slamming liabilities,¹⁷ the Commission has essentially precluded the telecommunications industry from using the Internet to acquire new customers until it decides the appropriate means. This proposal is now encompassed in a proceeding with other issues concerning unauthorized changes to a consumer’s presubscribed carrier, many of which are very contentious.

Since the Commission published this tentative conclusion, it is not apparent that any significant action has been taken on this issue, even though FCC Chairman William

¹³ Id. at 171.

¹⁴ Id. at 169.

¹⁵ See Comments to Second R&O and Further Notice of Qwest at 18; Comptel at 6; US West at 23; Tel-Save (Talk.com)4-17, and C&W 3-13.

¹⁶ See Comments to Second R&O and Further Notice of Ameritech at 15-16; Montana PSC at 3; NASCUA at 12; Florida PSC at 6; Excel at 4; Frontier at 8; CoreCom at 5; Missouri PSC at 3; TRA at 24.

¹⁷ While the Second R&O and Further Notice included very strict penalties on slammers, these rules are currently stayed by the court. MCI WorldCom, Inc. v. Federal Communications Commission, No. 99-1125 (D.C. Cir., May 18, 1999). However, the Commission has an interim policy of levying significant fines a repeat offenders.

Kennard stated it is “one of the Commission’s top priorities.”¹⁸ On September 17, 1999, 13 Members of Congress, expressing a concern that the FCC may be impeding electronic commerce through its actions and inaction in this docket, sent a letter to Chairman Kennard requesting the Internet LOA issue be addressed by November 30, 1999.¹⁹ On October 25, 1999, Chairman Kennard responded to these Members reiterating the issues mentioned in the FNPRM and stating the Commission “intends to issue an order shortly resolving all of the issues in the [FNPRM], including the issue of Internet LOAs.”²⁰

The Competitive Telecommunications Association (“CompTel”), an industry association representing many small and medium sized telecommunications carriers, has also followed up with two letters concerning the Commission’s inaction on this issue. On November 3, 1999, CompTel requested “the Commission act expeditiously to allow Internet LOAs to be used as permissible evidence of consumer intent to switch their local and long distance providers.”²¹ On January 7, 2000, CompTel again requested the Commission authorize Internet LOAs without undue delay.²²

Recommended Action

The Subgroup should recommend that the Commission separate the issue of Internet LOAs from the other matters in its FNPRM and address this issue immediately. First, the use of the Internet to change telecommunications providers or services is a matter concerning authorized changes in service, whereas the other matters in the FNPRM predominately concern unauthorized transactions and the proper remedies for these actions. Second, a matter concerning the use of the Internet and electronic commerce should be considered independently due to the time sensitive nature of Internet matters. Other matters in this docket are not as pressing. Third, any consumer protection concerns can be addressed by the Commission in its rulemaking proceeding. This blanket prohibition on these transactions is not narrowly tailored to meet any of these concerns and unduly discriminates against electronic commerce.

Conclusion

The issue over whether the FCC permits carriers to use Internet LOAs in switching a consumer’s presubscribed carrier is not one of substance for the Subgroup, but one of

¹⁸ See October 25, 1999, Letter from FCC Chairman William Kennard to The Honorable Steve Largent, *et al.*, (“FCC Letter”).

¹⁹ See September 17, 1999, Letter from Michael G. Oxley, Member of Congress, *et al.*, to The Honorable William E. Kennard, Chairman, Federal Communications Commission.

²⁰ See FCC Letter.

²¹ See November 3, 1999, Letter from Carol Ann Bischoff, Executive Vice President & General Counsel, Competitive Telecommunications Association, to The Honorable William E. Kennard, Chairman, Federal Communications Commission.

²² See January 7, 2000, Letter from Carol Ann Bischoff, Executive Vice President & General Counsel, Competitive Telecommunications Association, to The Honorable William E. Kennard, Chairman, Federal Communications Commission.

procedure. C&W is not requesting the Subgroup, Department, the White House, or any federal agency other than the FCC make the decision on how carriers should use the Internet for these transactions. The record before the FCC speaks for itself. Rather, C&W is urging the Subgroup to recognize the Commission's choice of handling this issue was not the best course of action, and the Subgroup should recommend this situation be rectified by separating the Internet LOA issue from the larger proceeding and finalizing these rules as soon as possible.

Basic Questions for Public Comment

Pursuant to the Notice,²³ C&W hereby submits direct responses to the basic questions concerning the Internet LOA issue.

1. Does any federal agency-administered law or regulation impose an impediment to the conduct by electronic means of commercial transactions between you or your firm, company or organization and any other non-government party or parties?

Yes, the FCC's tentative conclusion that Internet LOAs are not compliant with its current rules and subsequent inaction on this matter is an impediment to the conduct by electronic means between C&W and its customers and other telecommunications carriers and their customers.

- 2(a). What is the degree of the impediment?

This impediment is currently an outright prohibition. If a telecommunications carrier were to provide an Internet LOA to the Commission as proof that it had the authorization to switch a consumer's presubscribed carrier, then the Commission would hold this carrier liable for slamming. The FCC recently has levied fines in excess of \$1 million on carriers liable for slamming.

- 2(b). What is the nature of the impediment?

The Commission's tentative conclusion. This is not a final rule or an enforcement action, rather it is the Commission's interpretation of its present rules. Regardless, carriers are on notice that Internet LOAs are currently invalid and their use could result in harsh slamming liabilities.

- 2(c). Can you provide information as to the costs that are associated with or result from the legal or regulatory impediment?

²³ 65 Fed. Reg. at 4802.

Carriers could realize significant cost savings by using Internet LOAs. Costs associated with delivering the contract to the consumer, implementation in the carrier's internal system, and storage of information could be significantly reduced by carriers using the Internet for this purpose. At the same time, Internet LOAs provide widespread consumer benefits. Consumers can compare competing carrier's web sites, agree to service in the privacy of their own home, and access additional information concerning the potential carrier. These benefits are truly realized when compared with the present means consumers can acquire telecommunications services – direct sales visits or telemarketing calls.

- 2(d). What do you understand to be the reason for imposing the requirement that causes the impediment?

An inappropriate means to addressing the issue. The Commission has legitimate concerns over consumer protection, privacy, and slamming. However, a more proper means to addressing the Internet LOA issue would have been recognizing they are valid under the present rules while proposing safeguards they believed necessary. By taking this course of action, the Commission would have allowed carriers and consumers to use Internet LOAs over the past 15 months while it decided whether any additional consumer protection safeguards were necessary.

- 2(e). Can you suggest alternative ways, other than through the requirement that causes the impediment, by which the agency could achieve the goal of the requirement?

Other than the suggested course of action in 2(d), the only resolution on this matter is for the Commission to finalize its rule on the Internet LOA matter. The most expedient means for this to occur is for the Commission to separate this issue from others in the FNPRM and consider it immediately.

- 2(f). Can you suggest ways in which the requirement can be modified to remove or reduce the impediment while continuing to provide consumer protection for electronic transactions that are equivalent to those that exist for offline transactions?

Internet LOAs are not a threat to consumer protection. Consumers will simply be provided an additional means to interact with their telecommunications carriers.

Respectfully Submitted,

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March 17, 2000